Tajjul Ariffin bin Mustafa v Heng Cheng Hong

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-41-1991
HARUN HASHIM, EDGAR JOSEPH JR AND WAN YAHYA SCJJ
14 APRIL 1993

Civil Procedure *— Parties — Addition of co-defendant applied for by defendant — Objection by plaintiff — Whether plaintiff can be compelled to add a second defendant against whom the plaintiff does not wish to proceed — Discretion of court — Subordinate Court Rules 1980 O 8 r 6(2)(b) — Rules of the High Court 1980 O 15 r 6(2)(b)*

A collision occurred involving two motor cycles. The plaintiff who was a pillion passenger of the motor cycle driven by Lim Ah Chooi as servant or agent of one Lin Yu Hua, sued the defendant for damages for personal injuries arising out of the collision. The defendant had applied to have Lim Ah Chooi and Lim Yu Hua added as second and third defendants and that the plaintiff made the necessary amendments to the statement of claim to plead negligence against them. The learned sessions judge allowed the application for joinder of the intended second and third defendants, but disallowed the application for the amendment of the plaintiff's statement of claim finding that she did not have the power to grant the order sought. An appeal to the High Court was dismissed and the defendant appealed to the Supreme Court. The issue which arose in the appeal was what the ambit of the court's power was under O 8 r 6(2)(b) of the Subordinate Court Rules 1980 ('the SCR') (equivalent to and in pari materia with O 15 r 6(2)(b) of the Rules of the High Court 1980 ('the RHC')) upon the application of the defendant in a running down case to compel the plaintiff to add a second defendant, against whom the plaintiff does not wish to proceed.

Held, dismissing the appeal:

(1) It is manifestly clear that in neither *Hee Awa & Ors v Syed Mohammad Sazalay & Anor* nor *Chan Yee v Chan Yoke Fong* was the Supreme Court attempting to lay down any principles whatsoever other than those found in the relevant rules of the court, to govern the exercise of judicial discretion reposed in the court of first instance. These two cases should be read in the light of the facts of those cases and not as imposing any fetter on the exercise of the discretion given to a judge when considering an application by the defendant for joinder of another defendant, over the objections of the plaintiff.

(2) The power of the court to add a defendant on the application of the defendant, against the wishes of the plaintiff is entirely discretionary and the only fetter which O 15 r 6(2)(b)(i) of the RHC places upon the exercise of the discretion is that it should be exercised where there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court, it would be

just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter.

(3) The objects of r 6(2)(b) as to joinder of parties are, generally speaking, the same as the object of the rules governing third party proceedings that is to say: (a) to prevent multiplicity of proceedings and to enable the court to detemine disputes between all parties to them in one action; and (b) to prevent the same or substantially the same questions or issues being tried all over again with possibly different results.

(5) A plaintiff cannot be forced upon the application of the defendant, to have a second defendant against whom he does not wish to proceed added, for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made and so he should be allowed to proceed against the defendant of his choice.

[Bahasa Malaysia summary

Suatu pelanggaran telah berlaku di antara dua motosikal. Plaintif, seorang penumpang motosikal yang dipandu oleh Lim Ah Chooi sebagai penjawat atau wakil Lin Yu Hua, telah mendakwa defendan untuk gantirugi bagi kecederaan diri akibat pelanggaran itu. Defendan telah memohon supaya Lim Ah Chooi dan Lim Yu Hua dicantumkan sebagai defendan kedua dan ketiga dan supaya plaintif membuat pindaan yang perlu kepada penyataan tuntutannya untuk mendakwa kecuaian terhadap mereka. Hakim mahkamah sesi yang arif membenarkan permohonan percantuman pihak defendan kedua dan ketiga, tetapi menolak permohonan untuk pindaan pernyataan tuntutan itu kerana beliau berpendapat bahawa beliau tidak mempunyai kuasa untuk memberi perintah yang dituntut. Rayuan kepada Mahkamah Tinggi telah ditolak dan perayu telah membuat rayuan ke Mahkamah Agung. Isu yang timbul di dalam rayuan itu adalah apanya batasan kuasa mahkamah di bawah A 8 k 6(2)(b) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR itu') (yang sama dengan A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu')) atas permohonan defendan di dalam kes pelanggaran untuk memaksa plaintif mencantumkan defendan kedua, terhadap siapa plaintif itu tidak ingin mengambil tindakan.

Diputuskan, menolak rayuan itu:

(1) Adalah jelas sekali bahawa di dalam kedua-dua kes *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* dan *Chan Yee v Chan Yoke Fong*, Mahkamah Agong tidak bertujuan untuk menetapkan sebarang prinsip selain dari apa yang terdapat di dalam kaedah-kaedah mahkamah yang relevan, untuk mengawal penggunaan budibicara kehakiman yang diberi kepada mahkamah perbicaraan. Kedua-dua kes ini hendaklah dibaca berdasarkan fakta kes-kes itu dan bukan sebagai mengenakan sebarang halangan keatas pengunaan budibicara yang diberi kepada seseorang hakim apabila

menimbangkan suatu permohonan oleh defendan untuk mencantumkan defendan yang lain, di mana terdapat bantahan oleh plaintif.

(2) Kuasa mahkamah untuk menambahkan seseorang defendan atas permohonan defendan, bertentangan dengan kehendak plaintif adalah sepenuhnya mengikut budibicaranya dan satu-satunya halangan yang terdapat di bawah A 15 k 6(2)(i) KMT itu terhadap penggunaan budibicara adalah bahawa budibicara itu hendaklah digunakan apabila terdapat soalan atau isu yang timbul dari atau berhubung atau berkaitan dengan apa-apa relif atau remedi yang dituntut di dalam satu guaman atau perkara di mana mahkamah berpendapat bahawa ianya adalah adil dan sesuai diputuskan di antara orang yang ditambah itu dan pihak-pihak itu dan juga di antara pihak kepada guaman atau perkara itu.

(3) Tujuan k 6(2)(b) mengenai percantuman pihak adalah, pada amnya, sama dengan tujuan kaedah-kaedah yang mengawal prosiding pihak ketiga iaitu: (a) untuk mengelak kegandaan prosiding dan untuk membolehkan mahkamah menyelesaikan pertikaian antara kesemua pihak di dalam satu tindakan guaman; dan (b) untuk mengelak soalan atau isu yang sama dibicarakan berulangkali mungkin dengan keputusan yang berlainan.

(4) Seseorang plaintif tidak boleh dipaksa atas permohonan defendan, untuk mencantumkan seseorang defendan kedua yang beliau tidak ingin mengambil tindakan terhadap, kerana kecuaian defendan kedua yang dicadangkan itu tidak merupakan suatu isu yang terlibat di dalam tuntutan yang telah dibuat olehnya dan oleh itu beliau sepatutnya dibenar meneruskan tindakan terhadap defendan yang dipilih olehnya.]

Notes

For a case on the application by a defendant for the addition of a co-defendant in a trial, see 2 *Mallal's Digest* (4th Ed) para 1575.

Cases referred to

1 *Norbury Natzio & Co Ltd v Griffiths* [1918] 2 KB 369 (refd)
2 *Hee Awa & Ors v Syed Muhammad Sazalay & Anor* [1988] 1 MLJ 300 (distd)
3 *Chan Yee v Chan Yoke Fong* [1990] 3 MLJ 297 (distd)
4 *White v Carrara Ceiling Co Ltd* [1944] NZLR 577 (refd)
5 *Courtney v Woods* [1946] NZLR 350 (refd)
6 *McCheane v Gyles (No 2)* [1902] 1 Ch 911 (refd)
7 *Atid Navigation Co Ltd v Fairplay Towage & Shipping Co Ltd* [1955] 1 All ER 698 (refd)
8 *Hordern-Richmond Ltd v Duncan* [1947] 1 KB 545 (refd)
9 *Leaver v Transport (Nelson) Ltd* [1960] NZLR 44 (refd)
10 *Abonloff v Oppenheimer* (1882) 30 WR 430 (refd)
11 *Dollfus Mieg et Compagnie SA v Bank of England* [1951] 1 Ch 33 (refd)
12 *Hood-Bars v Frampton & Co* [1924] WN 287 (refd)
13 *Jones v Curling & Anor* 13 QBD 262 (refd)

14 *The Friedberg* 10 P 112 (refd)
15 *Quinn v Leathem* [1901] AC 495 (refd)
16 *Phillips v Copping* [1935] 1 KB 15 (refd)
17 *Hee Cheng v Krishnan* [1955] MLJ 103 (refd)
18 *Snell v Unity Finance Co Ltd* [1964] 2 QB 203 (refd)
19 *Luckett v Wood* (1908) 24 TLR 617 (refd)
20 *Duncan & Anor v Cammell, Laird & Co* Ltd [1942] AC 624 (refd)
21 *Conway v Rimmer & Anor* [1968] AC 910 (refd)
22 *Royster v Cavey* [1947] 1 KB 204 (refd)
23 *Sumner v William Henderson & Sons Ltd* [1963] 1 WLR 823 (refd)
24 *Glasgow Navigation Co v Iron Ore Co* [1910] AC 293 (refd)
25 *Horwell v London General Omnibus Co* [1877] 2 Ex D 365 (refd)

Legislation referred to
Subordinate Court Rules 1980 O 8 r 6(2)

Appeal from: Civil Appeal No 12–41–89 (High Court, Alor Setar)

Khoo Eng Chin (*Khoo & Sidhu*) for the defendent.
NM Tiong (*NM Tiong & Co*) for the plaintiff.

Cur Adv Vult

Edgar Joseph Jr SCJ (delivering the judgment of the court): Broadly stated, the issue which arises for decision in this appeal is: what is the ambit of the court's power under O 8 r 6(2)(b) of the Subordinate Courts Rules 1980 ('the SCR') (equivalent to and in pari materia with O 15 r 6(2)(b) of the Rules of the High Court 1980 ('the RHC')) upon the application of the defendant in a running down case to compel the plaintiff to add a second defendant against whom the plaintiff does not wish to proceed ?

In this judgment, all references to the provisions of the RHC must be taken as also referring, where the context so requires, to the equivalent provisions of the SCR.

To put matters in their correct perspective, it is necessary to reproduce the provisions of O 8 r 6(2) of the SCR. It says this:

> At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application —
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;
> (b) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party;
>
> but no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorised.

It would be more convenient if we referred to the appellant and the respondent in the present appeal, as the defendant and the plaintiff,

respectively.

The circumstances, out of which the above question of law arose were these:

Some six years ago, at the junction of Jalan Telok Wanjah/Jalan Langgar, Alor Setar, in the state of Kedah, a collision had occurred involving two motor cycles, namely, motor cycle KL 7102 on which the plaintiff was a pillion passenger, the rider being one Lim Ah Chooi as servant or agent of one Lim Yu Hua, and motor cycle KT 2584 ridden by the defendant.

Before the hearing, counsel for the defendant had applied by summons supported by affidavit affirmed by a solicitor of the firm of instructing solicitors, that Lim Ah Chooi, the rider of motor cycle KL 7102 and his alleged master or principal Lim Yu Hua, be added as second and third defendants, respectively, on the ground that the collision was caused or substantially contributed to by the negligence of Lim Ah Chooi. Counsel for the plaintiff had no objection to this prayer, but he did object to the very next prayer, namely, prayer 3, which reads: 'that the plaintiff do make the necessary amendments to the statement of claim to plead negligence against the said Lim Ah Chooi, the intended second defendant, as the servant or agent of Lim Yu Hua, the intended third defendant.'

In support of prayer 3 of his application, counsel for the defendant quoted the following passage in 30 *Atkin's Court Forms* (1987 Ed) at p 11 under the heading, 'Joinder of Defendants' which reads: 'As a general rule a person cannot be added as a defendant against the wishes of the plaintiff, but the court has a wide discretion and, eg may, on the application of the defendant, *add persons alleged to be joint contractors*, without the consent of the plaintiff ...'. (Emphasis added.) In support, and by way of illustration, the case of *Norbury Natzio & Co Ltd v Griffiths*,[1] was cited by the learned editors, and Form 13, being the actual order made in that case, is reproduced at p 48.

The learned sessions judge pointed out that in that case, a plaintiff had sued a defendant for a debt which the defendant had admitted was due from the executors of the estate of a deceased person, of whom he was one and X another. The defendant had applied for the plaintiff to add X as a co-defendant on the ground that they were joint contractors so that he could file a counterclaim against the plaintiff.

The learned sessions judge thought that given the facts, *Norbury*[1] was distinguishable because in that case any amendment would have been minimal, *whereas* in the instant case, the amendments would be substantial, involving as it would have, an allegation of negligence, against the intended second defendant, to be supported by particulars of negligence. She reasoned: 'Can the defendant then specify the particulars of negligence to be pleaded or compel him (the plaintiff) to amend his pleadings yet again if the particulars of negligence pleaded are not satisfactory?'

Similarly, she also considered the Supreme Court decision in *Hee Awa & Ors v Syed Muhammad Sazalay & Anor*.[2] In that case, the injured passenger of a government van had sued the motor cyclist in the sessions court, arising out of a collision involving the van and the motor cycle, and the van driver and the Government of Malaysia were made third parties. The pillion passenger on the motor cycle was killed as a result of injuries he had sustained in the collision and his parents and administrators of his estate

sued the van driver and the Government of Malaysia in the High Court, claiming damages under ss 7 and 8 of the Civil Law Act 1956. The van driver and the Government of Malaysia then applied under O15 r 6(2)(b) of the RHC, for an order that the motor cyclist be joined as a co-defendant. The application was dismissed by the senior assistant registrar but on appeal, the judge of the High Court reversed the order of the senior assistant registrar, and ordered the motor cyclist to be added as a co-defendant in the action, over the objections of the parents and the administrators who then appealed to the Supreme Court.

The Supreme Court, in the final passage of its judgment, after observing that learned federal counsel had informed the court below that the van driver and the Government of Malaysia would be applying for consolidation of the actions in the sessions court and the High Court, held that in the circumstances, the order allowing the motor cyclist to be joined as a co-defendant was to ensure that all matters in dispute in the cause be 'effectively and completely determined and adjudicated upon' as envisaged by O 15 r 6(2)(b), and so the learned judge did not err in exercising his discretion in making the order for joinder. In the result, the appeal was dismissed.

The learned sessions judge held that *Hee Awa*'s case[2] was also distinguishable because the statement of claim needed to be amended by only adding the co-defendant since the two actions were to be consolidated and all the issues in dispute had already been raised in the pleadings as they stood. The case was therefore not an authority for compelling a plaintiff to amend his pleadings. She therefore concluded that neither the SCR nor the authorities permitted her to grant prayer 3 and accordingly disallowed it. However, she did grant the prayer for joinder of the intended second and third defendants even though she agreed that in the absence of an allegation of negligence by the plaintiff in the statement of claim against the intended co-defendants, joining them was an exercise in futility.

On appeal by the defendant against the judgment of the sessions judge to the High Court, KC Vohrah J painstakingly analyzed the judgment of *Hee Awa*,[2] and in the course of that analysis, he pointed out, in our view quite correctly:

> I think it can be said that at the time of the application in the High Court to add the motor cyclist as co-defendant all the pleadings in both the sessions court and High Court cases had already been laid bare for all the parties to see. It is obvious the defence of the motor cyclist, the defendant in the sessions court, would have been disclosed, his pleadings made known. The pleadings of the third parties (the van driver and the Government of Malaysia) in the sessions court must have made known too. In the High Court the pleadings of the plaintiffs (the parents and administrator of the pillion rider) and of the defendants (the van driver and the Government of Malaysia) must have been disclosed. And when application by the defendants to add the motor cyclist as co-defendant was allowed by the High Court and the Supreme Court, it was allowed with the knowledge that there was to be a consolidation of the sessions court case with the High Court case and undoubtedly the plaintiffs in the High Court would have been aware of the pleadings filed by the motor cyclist as defendant in the sessions court as indeed the plaintiffs would have been aware of the pleadings of the van driver and of the Government of Malaysia as third parties in the sessions court. There does not appear to be a prayer for the pleadings of the plaintiffs in the High Court to be amended. If the plaintiffs in the High Court had desired to amend

their statement of claim to take into account the added defendant the plaintiffs would have some inkling of what they had to do through the third party notice and the disclosure of the third parties' pleadings in the sessions court in defence of the defendant's (the motor cyclist's) third party notice stating the nature and grounds of the claim. It will be noted that in the judgment of the Supreme Court in *Hee Awa* nothing was stated about the plaintiffs having to amend their statement of claim nor about any objection being raised by the plaintiffs in the High Court that they would not be able to amend their statement of claim to take into account the addition of the motor cyclist as a co-defendant. The objection of the plaintiffs was based on something else. In fact the Supreme Court stated at p 301 that the respondent's objection to the application 'was not grounded on the fact that the motor cyclist's rights against or liabilities to any party would not be affected by the final outcome of the action, but was based on the irrelevant ground that the appellant would be financially better off if the respondent's application was refused'.

The learned appellate judge also referred to the later Supreme Court case of *Chan Yee v Chan Yoke Fong*,[3] — also a running down case — involving two motor cyclists, the pillion rider on one of them having died as a result of the injuries he had sustained and his father had sued the rider of the other motor cycle for damages for himself and his wife, the mother of the deceased pillion passenger.

In the High Court at Ipoh, before Annuar J, the rider of the other motor cycle had applied for leave to bring in the rider of the motor cycle on which the deceased had been riding pillion as a co-defendant but this was refused on the ground that he should have been brought in as a third party. But, on appeal to the Supreme Court, the order of Annuar J was set aside. There was, however, no written judgment by the Supreme Court.

Be that as it may, the defendant then renewed his application in the High Court at Ipoh to bring in the rider of the motor cycle on which the deceased was riding pillion, this time, before Peh Swee Chin J (as he then was) who granted the same as he considered himself bound by *Hee Awa*'s case.[2]

On appeal to the Supreme Court, counsel for the rider of the motor cycle on which the deceased was riding pillion (the appellant) had argued that *Hee Awa*'s case[2] was wrongly decided; more particularly, that it was decided per incuriam because certain relevant authorities were not brought to the attention of the court; for example, the New Zealand cases of *White v Carrara Ceiling Co Ltd*[4] and *Courtney v Woods*;[5] and the English cases of *McCheane v Gyles (No 2)*;[6] *Atid Navigation Co Ltd v Fairplay Towage & Shipping Co Ltd*[7] and *Hordern-Richmond Ltd v Duncan*[8] which were applied in the New Zealand case of *Leaver v Transport (Nelson) Ltd.*[9]

It is unnecessary to discuss the authorities relied upon by counsel for the appellant in *Chan Yee*[3] as these had been considered by the Supreme Court on appeal. Suffice it to say, that the Supreme Court was of the view that the question before the court in *Hee Awa*[2] concerned the true interpretation of O 15 r 6(2)(b) of the RHC and having considered its judgment therein, the Supreme Court concluded that it was unable to fasten onto any part of the judgment and say that there was any slip or error in the process of the reasoning therein.

In his analysis of *Chan Yee*'s case,[3] KC Vohrah J pointed out, and we agree, that:

... there is nothing in the judgment to suggest that the plaintiff was required to amend his pleadings to take into account the added defendant nor is there anything therein to suggest that in opposing the application to add the co-defendant the plaintiff raised the issue that he would not be able to amend his statement of claim to take into account the addition of another person as a co-defendant.

And next, dealing generally with both *Hee Awa*[2] and *Chan Yee*,[3] he pointed out — and again we agree — that neither *Hee Awa*[2] nor *Chan Yee*[3] had whittled down the discretion of the court of first instance in considering applications for joinder of defendants in running down cases of the sort before him and that the decisions therein were made on their own merits having regard to the particular facts.

And then, turning to the merits of the case before him, the learned appellate judge said this:

The plaintiff had no objections to all the prayers except for prayer 3, ie the prayer that the plaintiff do make the necessary amendments to the statement of claim against the rider of the motor cycle on which the plaintiff was pillion rider and against the master or principal of the rider. The plaintiff objected to the prayer on the ground that there is no substantive law to compel the plaintiff to sue another party and he raised the issue as to what particulars the court would have to order the plaintiff to plead if the application for the prayer was allowed.

The learned judge of the sessions court allowed prayers 1–6 except for prayer 3 and she held the view that she could not compel the plaintiff to plead negligence against the intended co-defendant. This is what she said: 'It is indisputable that adding the co-defendants would ensure that all matters in dispute (would) be effectually and completely determined. However, to compel the plaintiff to make the amendments sought involves substantive rather than procedural law. Can the defendant then also specify the particulars of negligence to be pleaded or compel him to amend his pleadings yet again if the particulars of negligence pleaded are not satisfactory?'

The learned appellate judge went on to remind himself of the well known proposition that in an action in tort the plaintiff has a free hand as to whom to sue. The plaintiff is not now, and never was, obliged to join as a defendant every person who was liable to him for that tort. He may, if he prefers, sue one or two; and the liability of the others will be no defence to those sued, and will not mitigate the damage recoverable, for all persons concerned in a common wrongful act are jointly and severally liable for all damage caused by it. (See Odgers on *Pleading and Practice* (20th Ed) at p 20.)

He then expressed his concurrence with the view of the learned judge of the sessions court that to have granted prayer 3 of the defendant' s application would have meant compelling the plaintiff to plead particulars of negligence against the intended co-defendant when there was nothing on record to show that the proposed co-defendant was negligent.

And, towards the end of his judgment, he said this at p 37 para E line 3 to p 38 para A line 4:

Although the plaintiff had consented to the other prayers (and her counsel said he did so to save time as his objections in previous cases had been rejected) he objected to prayer 3 and he asked, 'If court allows application, what particulars

A will the court order the plaintiff to plead? Do we plead particulars relevant to this case or not?' These are pertinent questions.

He then concluded his judgment at p 38A lines 4 et seq as follows:

> Bearing in mind the case of *Norbury Natzio* another pertinent question which has to be asked earlier is — is there anything on record to show, on a reasonable and probable basis, that the proposed co-defendant was wholly or partly responsible for the accident? There is none. And to order the plaintiff to amend her statement of claim would be in effect to compel the plaintiff to sue a proposed co-defendant who for all one knows was not responsible at all for the accident and therefore not tortiously liable, and, more importantly, to compel the plaintiff to plead particulars of negligence against the proposed co-defendant which may well be non-existent.
>
> In my view, the learned judge of the sessions court exercised her discretion correctly under O 8 r 6(2)(b) on the material available before her in the case and I accordingly dismiss the appeal.

To revert to the question of law posed at the outset, we consider that the following general principles as to parties may be distilled from the rules of court and the authorities thereon.

(1) The principle of overriding importance is that all necessary and proper parties, but no others, should be before the court at the same time to enable the effectual and complete determination and adjudication to be made by the court of all questions and issues between the parties which arise for decision. (See O 15 rr 4 and 6 of the RHC.)

(2) To this end, no action will be defeated by reason of mere mis-joinder or non-joinder of any party which is capable of being remedied and is no defence. (See *Abonloff v Oppenheimer.*[10])
The joinder of parties is permitted as of right in a wide area of circumstances or otherwise with the leave of the court. (See O 15 r 4 of the RHC.)

(3) Additionally, the court has extensive discretionary powers — to add, substitute or strike out parties who are not proper or necessary, and for these purposes the court may even act of its own motion. (See O 15 r 6 of the RHC.)

(4) Generally, in common law and chancery matters, a plaintiff who considers that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and he cannot be forced to pursue his remedy against other persons who he has no wish to sue. (See Per Wynn-Perry J in *Dollfus Mieg et Compagnie SA v Bank of England.*[11])

(5) Nevertheless, a person who is not a party may be added as a defendant over the objections of the plaintiff on his own intervention or upon the application of the defendant or in some cases by the court of its own motion. (See 1 *Supreme Court Practice* (1991) at p 193 para 15/6/71.)

(6) But, a defendant against whom no relief is sought by the plaintiff will generally not be added against the wishes of the latter. (See *Hood-Bars v Frampton & Co.*[12]) A third party notice is in such a case usually the proper procedure to adopt though such a defendant can be added in a proper case. (See *Dollfus Mieg et Compagnie SA v Bank of England.*[11])

It is with the above general principles in mind that we approach the specific question which arises for decision in this appeal, namely, whether the courts below were right in disallowing prayer 3, whereby the defendant sought an order that the plaintiff be compelled (against his own wishes) to plead negligence against the intended second and third defendants aforesaid.

To recapitulate, but only briefly, insofar as the learned sessions judge was concerned, she refused prayer 3, simply on the ground that neither the SCR nor the authorities permitted her to grant the order sought. In other words, she did not consider that she had the *power* to grant the order sought.

As for the learned appellate judge, he pointed out that in neither *Hee Awa*[2] nor *Chan Yee*[3] was any attempt made by the court to whittle away the discretion of the court of first instance in the exercise of its powers under O 15 r 6(2) of the RHC (equivalent to O 8 r 6(2) of the SCR); that in neither of these cases did there appear to be a prayer, much less, an order requiring the plaintiff to amend his pleadings to take into account the added defendant, over the objections of the plaintiff, following the order for joinder of the intended defendant. In the circumstances, he was of the view that the learned sessions judge had exercised her *discretion* correctly under O 8 r 6(2)(b) on the material available before her, and he therefore dismissed the appeal.

Before us, counsel for the defendant (the appellant) did not attempt to impugn the judgments of the courts below but instead contended that *Hee Awa*,[2] and consequently *Chan Yee*,[3] were wrongly decided and, in this, he was supported by counsel for the plaintiff (the respondent). So, this was one of those rare cases where counsel on opposite sides were contending for the same result. They had explained, however, that they had adopted this curious stance because *Hee Awa*'s case,[2] and consequently *Chan Yee*,[3] were considered by many legal practitioners engaged in running down cases, and often in courts of first instance, as laying down general rules, which had the effect of fettering the discretion of the court when considering applications by a defendant for joinder of an intended defendant over the objections of a plaintiff. So much so, that this had resulted in confusion and possible injustice — so it was said.

First of all, we would begin by saying that it is manifestly clear that in neither *Hee Awa*[2] nor *Chan Yee*,[3] was the Supreme Court attempting to lay down any principles whatsoever, other than those found in the relevant rules of the court, to govern the exercise of a judicial discretion reposed in the court of first instance. As was well put by Bowen LJ in *Jones v Curling & Anor*[13] at p 271:

> I have always entertained the strongest opinion that the court would be acting ultra vires if it were to lay down a hard and fast line upon which discretion should be exercised when the Act of Parliament or judicature rule which creates the discretion gives it in simple and unqualified terms.

It follows, that if judges were to attempt to lay down any general rule for the exercise of a discretion created under the relevant rule of the court then, as was pointed out by Brett MR in *The Friedberg*[14] at p 113, they would be trying to fetter their own discretion and that of their successors which they would have no legal power to do.

Secondly, insofar as the power of the court to add a defendant on the application of the defendant against the wishes of the plaintiff is concerned, the jurisdiction of the court is entirely discretionary and the only fetter which RHC O 15 r 6(2)(b)(ii) places upon the exercise of the discretion which it gives to the judge of first instance is that it shall be exercised when there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between the person sought to be joined and that party as well as between the parties to the cause or matter.

Thirdly, the objects of para 2(b) as to joinder of parties are generally speaking the same as the objects of the rules governing third party proceedings, that is to say: (1) to prevent multiplicity of proceedings and to enable the court to determine disputes between all parties to them in one action; and (2) to prevent the same or substantially the same questions or issues being tried all over again with possibly different results. (See *Supreme Court Practice* (1991) para 15/6/7 at p 193.)

Fourthly, the most scrupulous attention must be paid to the facts of previous cases cited to the court. This requirement is the anchor sheet of the doctrine of precedent according to which like cases must be decided alike. And so, the probability that a court will decide a particular case in the same way as would the court which decided one of the cases cited will become less and less as the differences between the facts of the two cases increase. We are thus reminded, of the oft quoted passage in the judgment of Lord Halsbury in *Quinn v Leathem*[15] which runs as follows:

> Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are to be found.

It is in the light of these principles that the cases of *Hee Awa*[2] and *Chan Yee*[3] should be considered. In other words, the judgment in those cases should be read in the light of the facts of those cases and not as imposing any fetter on the exercise of the discretion given to a judge when considering an application by the defendant for joinder of a defendant, over the objections of the plaintiff, in any new case.

To revert to the present appeal, we detect no error in the reasoning of the learned sessions judge in the view she took that having regard to the particular circumstances of the case before her, there was nothing in the rules or the authorities empowering her to grant prayer 3 of the defendant's application and so order the plaintiff (contrary to his wishes) to plead negligence against the intended second and third defendants. That being so, it was really an act of supreme futility, to have granted prayer 1, and so requiring the joinder of the intended second and the third defendants. This must be so, because if the plaintiff were to refuse to plead negligence against the intended second and third defendants, they could then successfully apply that the suit, insofar as it involves them, be struck out as disclosing no reasonable cause of action.

Under the adversary system, the court has neither the power nor the duty to determine what are the issues or questions in dispute between the

parties; save as may appear from the pleadings or other statements of the parties, the court has no investigative process of its own. The parties enjoy complete freedom by their pleadings or other requisite statements to delimit the issues or questions of fact or law, which they desire the court to determine and the court is bound to confine itself to only those issues or questions and no others.

There are of course exceptions, for instance, 'it is the duty of the court when asked to give a judgment which is contrary to a statute to take the point, although litigants may not take it' (per Scrutton LJ in *Phillips v Copping*[16] applied by Thomson J (as he then was) in *Hee Cheng v Krishnan*[17]). Similarly, it is under a duty to take notice of illegality (*Snell v Unity Finance Co Ltd*[18]) or statutory invalidity (*Luckett v Wood*[19] (gaming debt)) and the court is also under a duty of its own motion to rule as inadmissible any document or evidence which is protected from disclosure on the ground of crown privilege. (See *Duncan & Anor v Cammell , Laird & Co Ltd*[20] as watered down by *Conway v Rimmer & Anor* .[21])

Moreover, the court will of its own motion decline jurisdiction where the proceedings are based on a fiction — *Royster v Cavey*[22] or on hypothetical questions or issues — *Sumner v William Henderson & Sons Ltd*[23] or on dead or spent issues (*Glasgow Nagivation Co v Iron Ore Co*[24]). These exceptions are not exhaustive and mentioned by way of illustration.

The learned appellate judge in this instant case was therefore right in dismissing the appeal from the judgment of the learned sessions judge.

To sum up, therefore, we would answer the question posed at the outset of this judgment by saying that a plaintiff cannot be forced, upon the application of the defendant, to have a second defendant added, against whom he does not wish to proceed for the reason that the negligence of the intended second defendant is not an issue involved in the claim he has made (*McCheane v Gyles*;[6] *Horwell v London General Omnibus Co*; *Re London Tramways Co*;[25] *White v Carrara Ceiling Co*[4]) and so he should be allowed to proceed against the defendant of his choice — *Courtney v Woods*.[5] There may be cogent reasons for his not wanting to proceed against the intended second defendant; for example, the intended second defendant, who is alleged by the defendant to have been wholly or partly at fault, may be a friend or next of kin of the plaintiff, or the joinder may result in unnecessary prolongation of the trial or in the plaintiff having to shoulder the burden of additional costs should he fail agalnst both the defendants. There may, of course, be other reasons.

Accordingly, we would dismiss this appeal, save and except that the order for joinder of the second and third defendants, and the consequential orders relating thereto, are set aside, for the reasons stated. There will, however, be no order as to costs, in view of the stance adopted by counsel on both sides. The deposit paid into court by way of security for costs of the appeal is to be refunded to the defendant (appellant).

Appeal dismissed.

Reported by Prof Ahmad Ibrahim